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No. 82-904

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONSTRUCTORA EL MONTE, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prematurity of petitioners' notice of appeal deprived the court of appeals of jurisdiction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1982 (Pet. App. 1-2). A petition for rehearing was denied on October 12, 1982 (Pet. App. 3). The petition for a writ of certiorari was filed on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in a civil forfeiture action in the United States District Court for the Southern District of Texas, certain items of petitioners' property were adjudged subject to forfeiture under 21 U.S.C. (Supp. V) 881(a)(6). The court of appeals thereafter dismissed petitioners'

appeal from the forfeiture order, ruling that the notice of appeal was ineffective under Fed. R. App. P. 4(a)(4) because it had been filed prior to the disposition of various post-verdict motions (Pet. App. 1-2).

1. The evidence established that petitioners had no significant wealth before they began trafficking in illegal drugs. The former spouses of petitioners Matias and Benito Montemayor both worked to support their families, and the families were always short of cash (6 Tr. 54). Petitioners Matias and Benito Montemayor inherited no wealth from their mother (GX 23-27), and federal investigators were unable to locate any employment records for Matias Montemayor until he and his brother opened a small, unprofitable grocery store in Cook County, Illinois, in 1974 (6 Tr. 57, 59). Petitioner Constructora El Monte, S.A., a Mexican construction company, was founded by the Montemayor brothers in March 1979, with assets of only $2,200 (6 Tr. 61).

Beginning in 1978, petitioners made purchases that could not have been funded from their legitimate financial resources. Those purchases included the property forfeited in the present case: a Piper Navajo airplane purchased on December 22, 1978, for $241,000 (6 Tr. 66; 9 Tr. 468-471); a house located in McAllen, Texas, purchased in November 1978 for $223,000 in cash (6 Tr. 65; 9 Tr. 481; GX 16); the quarter horses Levan Bars and Hopetowin, purchased on May 31, 1979, and a foal born in 1980 (8 Tr. 205-206); furniture purchased on November 15, 1978, for $18,000 in cash (7 Tr. 64-65); and patio furniture purchased in May 1980 for $2,736.30 in cash (8 Tr. 292, 297).

The evidence established that the source of funds for these expenditures was an extensive narcotics trafficking operation that included the manufacture of heroin in Mexico for importation to the United States, and distribution of

heroin, cocaine, and marijuana in Illinois, Texas, and elsewhere, under the direction of petitioners Benito and Matias Montemayor and their brothers (7 Tr. 12-23, 40-57, 81-100, 122-148; 8 Tr. 319-357; see *United States* v. *Montemayor*, 666 F.2d 235, 236-237 (5th Cir. 1982)). Petitioner Constructora El Monte, S.A., was used to "cover up" the illicit profits and activities of the narcotics operation (8 Tr. 354).

2. On November 25, 1981, six days after the jury's verdict for the government, petitioners filed motions to vacate the judgment, amend the judgment, for an instructed verdict, for judgment notwithstanding the verdict, and for a new trial (Pet. App. 22). On December 16, 1981, the government filed a response to the post-trial motions (*id.* at 23). The trial court entered a final judgment of forfeiture on January 5, 1982 (*id.* at 4-5, 23). On January 11, 1982, while the post-trial motions were still pending, petitioners filed a notice of appeal from the judgment of forfeiture (*id.* at 1, 23). The trial court denied petitioners' post-trial motions by written orders filed January 18, 1982, and entered on the docket sheet the following day (*id.* at 6-10; Lodging 8).[1] Petitioners did not file any subsequent notice of appeal (Pet. App. 2).

3. The court of appeals sua sponte dismissed the appeal after appellate briefs had been filed by all parties (Pet. App. 1-2), on the ground that petitioners' notice of appeal was

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[1]For the convenience of the Court, we are lodging with the Clerk a certified copy of the complete docket sheet of the district court in this case, mailed to counsel for the government by the Clerk, United States District Court for the Southern District of Texas, on January 7, 1983. The docket sheet shows the entries of the trial court's orders denying petitioners' post-trial motions, which [redacted] are omitted from petitioners' appendix (Pet. App. 11-23).

untimely under Fed. R. App. P. 4(a)(4).[2] The court explained (Pet. App. 1) that the trial court's final judgment of forfeiture "[did] not dispose of the pending post-verdict motions." Accordingly, petitioners' notice of appeal, filed during the pendency of the motions, was "precisely what Rule 4(a)(4) declares to be null" (Pet. App. 2). Because the error was jurisdictional, the court of appeals concluded (*ibid.*) that it could notice it sua sponte.

ARGUMENT

Petitioners contend (Pet. 7-17) that the court of appeals acted improperly in dismissing their appeal.[3] That contention is clearly incorrect in light of this Court's decision in *Griggs* v. *Provident Consumer Discount Co.*, No. 82-5082 (Nov. 29, 1982). In *Griggs*, as in this case, a notice of appeal

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[2]Fed. R. App. P. 4(a)(4) states (emphasis supplied):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment [notwithstanding the verdict] under Rule 50(b);(ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;(iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.* No additional fees shall be required for such filing.

[3]We have been informed that petitioner Benito Montemayor remains a fugitive following his indictment on November 17, 1981, in the Southern District of Texas for narcotics offenses related to this case. A fugitive petitioner in a criminal case is not entitled "to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970). A fugitive from a criminal conviction should similarly be disentitled to receive judicial consideration of an appeal in a related civil case.

was filed while a post-trial motion was still pending and thus was premature under Fed. R. App. P. 4(a)(4). The Court noted that, by its plain terms, Rule 4(a)(4) states that such a premature notice of appeal "shall have no effect" and that a new notice of appeal "must be filed" after the disposition of post-trial motions (slip op. 5). The Court observed that it is "well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional' " (*ibid.*, quoting *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978)). Thus, unless a new notice of appeal is filed after disposition of post-trial motions, the court of appeals "lacks jurisdiction to act" (slip op. 5). In such a case the court has no discretion to waive the requirements of timeliness (*ibid.*). Thus, because petitioners here did not file a notice of appeal after the trial court denied their post-trial motions the court of appeals was required to dismiss their appeal.[4]

Petitioners contend (Pet. 7-11) that the "disposition" of their post-trial motions occurred when the trial court entered the final judgment of forfeiture on January 5, 1982, not when the trial court issued written orders denying the motions on January 18, 1982. That contention is without merit. The judgment of forfeiture (Pet. App. 4-5) on its face does not state or in any way even suggest that it was intended to encompass a ruling on the motions. The subsequent entry of the written orders, which expressly indicated that the motions had been found to be without merit (Pet. App. 6-10), confirms that the trial court did not intend the judgment of forfeiture to constitute a ruling on the motions.

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[4]In *Griggs* the Court remanded the case, apparently because the record failed to indicate whether a new notice of appeal had been filed after the disposition of the post-trial motion (slip op. 1-2, 6). No remand is required in the present case. The court of appeals found (Pet. App. 2), and the docket sheet indicates (see Lodging 8-9), that no subsequent notice of appeal was filed, and petitioners do not suggest otherwise.

The court of appeals recognized (Pet. App. 1) that the judgment of forfeiture did not dispose of the pending motions. See *Partridge* v. *Presley*, 189 F.2d 645, 646-647 (D.C. Cir.), cert. denied, 342 U.S. 850 (1951)(entry of judgment did not amount to denial of a pending motion for a new trial since there was no evidence that the court consciously disposed of the motion at the time the judgment was entered). See also *Director of Revenue* v. *United States*, 392 F.2d 307, 309-310 (10th Cir. 1968); *United States* v. *Pan American World Airways, Inc.*, 299 F.2d 74, 76 (5th Cir. 1962), rev'd on other grounds, 382 U.S. 25 (1965); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* para. 204.12[4], at 4-84 to 4-85 (2d ed. 1982).[5]

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[5]The cases cited by petitioners (Pet. 8-9) for the proposition that a final judgment may constitute a ruling on all pending motions involved circumstances that suggested that the courts in those cases in fact had ruled on the motions prior to entry of formal orders to that effect. See, *e.g.*, *Addington* v. *Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981) (trial court and counsel commented on impropriety of motion during hearing; no order expressly denying motion ever entered); *Calhoun* v. *United States*, 647 F.2d 6 (9th Cir. 1981) (denial of motion shown on minutes of court and on docket; no formal entry of separate order); *Mosier* v. *Federal Reserve Bank*, 132 F.2d 710 (2d Cir. 1942) (trial court had recorded denial of motion on motion papers at the time the decree dismissing the complaint was entered). No such circumstances are present in this case.

Petitioners' claim (Pet. 11-14) that their post-trial motions were nullities because they were filed prematurely also lacks merit. By their terms, the rules governing motions for judgment notwithstanding the verdict, for a new trial, and to amend a judgment require that the motion be served "*not later than* 10 days after" the entry of judgment. Fed. R. Civ. P. 50(b), 59(b) and (e) (emphasis supplied). Thus, the rules do not forbid such motions prior to the formal entry of judgment. See *American Security Bank, N.A.* v. *John Y. Harrison Realty, Inc.*, 670 F.2d 317, 321 (D.C. Cir. 1982); *Smith* v. *Hudson*, 600 F.2d 60, 62 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); *Douglas* v. *Union Carbide Corp.*, 311 F.2d 182, 184 (4th Cir. 1962); see also 6A J. Moore, *Moore's Federal Practice* para. 59.09(1), at 59-221 (2d ed. 1982) (footnote omitted) (wording of Rule 59(b) was designed to be "broad enough to permit the motion to be made both before and after the entry of the judgment").

Petitioners' claim (Pet. 6, 8) that "[n]o copy of [the trial court's January 18, 1982, orders denying their post-trial motions] or notice of filing was ever sent to petitioners' attorneys, and no record of [their] filing appeared on the original docket sheet" is contradicted by the record. The docket sheet included in petitioners' appendix (Pet. App. 11-23) omits entries after January 11, 1982.[6] The complete docket sheet in this case, which we have lodged with the Clerk of this Court, shows (Lodging 8) that the trial court's orders denying the post-trial motions were entered on the docket sheet on January 19, 1982, and that, in the case of four of the five orders, all counsel were notified.[7]

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[6]Petitioners do not indicate the date on which they obtained the copy of the docket sheet that is reproduced at Pet. App. 11-23.

[7]Petitioners cite no evidence in support of their contention (Pet. 6, 8) that, contrary to the information on the docket sheet, no notice of the filing of the orders denying the post-trial motions was sent to their attorneys. We are advised by the United States Attorney that the government appears to have received copies of the orders on January 25, 1982. In connection with the petition for rehearing in the court of appeals, petitioners' Illinois attorneys submitted an affidavit stating that they had received notification of denial of the motions for the first time when they received a copy of the court of appeals' decision (Petition for Rehearing, Exhibit II, at 9a). However, petitioners submitted no affidavits from their local Texas counsel, who also represented them at the trial stage. See Pet. App. 12. Even if petitioners had established that notice of entry of the orders had never been given to counsel, this would not affect the time within which they could appeal. See Fed. R. Civ. P. 77(d).

In any event, any contention by petitioners that they are entitled to relief by virtue of lack of notice of the district court's action depends in part on factual assertions that cannot possibly be resolved by this Court on the present record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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